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No. 83-1431

In The

Supreme Court of the United States

October Term, 1983

DR. CHARLES McDANIEL, et al.,
Petitioners,

vs.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

No. 83-1451

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM, et al.,
Petitioners,

vs.

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JONATHAN A. ZIMRING, JR.

ROSE E. FIRESTEIN
PHYLLIS J. HOLMEN
JOHN L. CROMARTIE
Counsel for Respondents

Suite 630
133 Carnegie Way
Atlanta, Georgia 30303
(404) 688-4000

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102
(800) 835-7427 Ext. 333

QUESTIONS PRESENTED[1]

1. Do the Education for All Handicapped Children Act of 1975 and the Vocational Rehabilitation Act of 1973, as amended, require the individual consideration of the duration of a child's special education program? If so, does the requirement that children be individually considered for durational needs conflict with this Court's decision in *Board of Education of Hendrick Hudson School District v. Rowley,* 458 U.S. 176 (1982)?

2. May private litigants maintain concurrent class claims under the Education for All Handicapped Children Act and the Vocational Rehabilitation Act if a named representative has exhausted all administrative remedies, and if further exhaustion is futile?

3. Is the entitlement that handicapped children receive individual programs based on their unique needs sufficiently unambiguous so that the required consideration of the duration of services does not conflict with *Pennhurst State School v. Halderman,* 451 U.S. 1 (1981)?

4. Is the requirement under Section 504 that an "otherwise qualified handicapped" child of public school age have his individual needs considered and provided in order to provide an equal educational opportunity permissible if such consideration is necessary to assure the child receive some benefit from education?

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1. Two sets of petitioners have separately filed for certiorari and been assigned case Nos. 83-1431 and 83-1451. Respondents file this single response, combining and recasting the various questions presented in the two petitions.

5. May a certified class action continue if after judgment the individual claim of one of the class representatives is mooted against one set of defendants, but the individual claims against other defendants and all class claims remain active controversies? Under *Rowley*, does the finding of procedural violations against a class of children institute an injury so as to present a case or controversy under Article III of the Constitution?

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Authorities iv

Jurisdiction viii

Statement of the Case 1

A. Factual Summary 1

B. Procedural Summary 6

Reasons for Denying the Petitions 6

A. Summary of the Argument 6

B. Argument 7

I. Every federal court reviewing the special education requirements has held that school services on a yearly basis must be considered. These holdings are based on the requirements of individual consideration. 7

(a) The circuits agree that individual needs requires the consideration of a child's duration of educational services. 7

(b) The holdings in this case do not conflict with *Rowley*. 9

II. The Act and Section 504 can be applied concurrently in considering the needs of handicapped students. 10

(a) The circuits do not conflict on the maintenance of a claim for relief under both federal statutes. 10

(b) Exhaustion of administrative remedies is not an issue in this case. 11

(c) Exclusivity is not required. 12

TABLE OF CONTENTS—Continued

Pages

III. The act creates an entitlement to appropriate education services. This right does not abrogate the holding in *Pennhurst*. 13

IV. Education services are enforceable under Section 504. 14

V. Plaintiff class presents live and justiciable issues. 16

(a) The case is not moot against local defendants. 16

(b) The circuit affirmed relief to real litigants. 17

Conclusion 17

TABLE OF AUTHORITIES

CASES

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975) 16

Anderson v. Thompson, 495 F.Supp. 1256 (E.D. Wis. 1980), *aff'd on other grounds*, 658 F.2d 1205 (7th Cir. 1981) 8

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) 11

Baker v. Carr, 369 U.S. 186, 208 (1962) 17

Bales v. Clark, 523 F.Supp. 1366 (E.D. Va. 1981) 8

Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1980) 8, 9, 10

Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) ..... i, 6, 8, 9, 10, 13, 17

TABLE OF AUTHORITIES—Continued

Pages

Brown v. General Services Administration, 425 U.S. 820 (1976) 12

Califano v. Yamasaki, 442 U.S. 682 (1979) 16, 17

Cannon v. University of Chicago, 441 U.S. 677 (1979) 12

Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983) 8, 9

Doe v. Koger, 710 F.2d 1209 (7th Cir. 1983) 11

Garrity v. Gallen, 522 F.Supp. 171, 240 (D.N.H. 1981) 8

Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983) 12

Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981) 1, 2, 4, 5

Guardians Association v. Civil Service Commission of City of New York, — U.S. —, 103 S.Ct. 3221 (1983) 15

Hilden v. Evans, No. 80-511-RE (D. Oregon, Nov. 5, 1980) 8

Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982) 11

King v. Smith, 392 U.S. 309 (1968) 14

Lau v. Nichols, 414 U.S. 563 (1974) 15

Lee v. Clark, No. 80-0918 (D. Hawaii, January 30, 1981) 8

Monahan v. Nebraska, 687 F.2d 1164, (8th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1252 (1983) 11

Moore v. Roberts, No. LR-C-81-419 (S.D. Ark., July 24, 1981) 8

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) ..... i, 7, 13, 14

TABLE OF AUTHORITIES—Continued

Pages

Phipps v. New Hanover County Board of Education, 551 F.Supp. 732 (E.D. N.C. 1982) 8

Romasanta v. United Airlines, Inc., 537 F.2d 915 (7th Cir. 1975) *aff'd. sub nom* United Airlines, Inc. v. McDaniel, 432 U.S. 385 (1977) 16

S-1 v. Turlington, 635 F.2d 342 (5th Cir.), *cert. denied,* 454 U.S. 1030 (1981) 11

Smith v. Cumberland School Committee, 703 F.2d 4 (1st Cir. 1983) 11

Sosna v. Iowa, 419 U.S. 393 (1975) 16

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 7, 14, 15, 16

Timms v. Metro School District of Wabash County, Ind., 722 F.2d 1310 (7th Cir. 1983) 8, 10, 11

Timms v. Metro School District of Wabash County, Ind., 718 F.2d 212 (7th Cir. 1983) 10

Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981) 11

United States Parole Commission v. Geraghty, 445 U.S. 380 (1980) 16

Yaris v. Special School District of St. Louis County, 558 F.Supp. 545 (E.D. Mo. 1983) 8

STATUTES

Education for All Handicapped Children Act of 1975, Public L. 94-142, 20 U.S.C. §1401, *et seq.* ..... passim

20 U.S.C. §1415 12

20 U.S.C. §1415(e) 13

20 U.S.C. §1401(18) 13

20 U.S.C. §1401(19)(D) 13

TABLE OF AUTHORITIES—Continued

Pages

Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, et seq. 12

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq. 13

Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 ..... passim

29 U.S.C. §794a 11, 15

29 U.S.C. §794a(2) 12

42 U.S.C. §1983 11

REGULATIONS

34 C.F.R. 104.36 12

JURISDICTION

Respondents do not contest that petitioners have timely filed their petitions for certiorari. Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met. Contrary to the assertion of petitioners the Circuits are not in conflict concerning this case's issues. Moreover, the Circuit has correctly applied the rulings of this Court. Finally, the limited relief afforded respondents minimizes the questions concerning the role of the judiciary and thus the magnitude of the federal questions. The Court should deny the discretionary review requested.

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STATEMENT OF THE CASE

A. Factual Summary

The trial court fully described the nature of the instant case in *Georgia Association of Retarded Citizens v.*

McDaniel, 511 F.Supp. 1263, 1265-1266 (N.D. Ga. 1981) (hereinafter "*GARC*") and respondents adopt that statement. In summary, this class action addressed the arbitrary denial of educational services of appropriate duration to mentally retarded children. The petitioners seek review of a decision that the Education for All Handicapped Children Act of 1974, P.L. 94-142, 20 U.S.C. §1401 et seq. (hereinafter "Act"), and Section 504 of the Vocational Rehabilitation Act, as amended, 29 U.S.C. §794 et seq. (hereinafter "Section 504") require the consideration of the need for educational services in excess of 180 days a year during a review of a child's "appropriate education."

The petitioners Board of Public Education for the City of Savannah and County of Chatham, et al. (hereinafter "local defendants") and Dr. Charles McDaniel and State Board of Education[1] (hereinafter "State defendants") neglected to summarize several aspects of the evidence and proceedings below.

Prior to the September 1, 1978 enforcement date in the Act, Russell Caine and hundreds of members of the Georgia Association for Retarded Citizens (hereinafter "Association") had been absolutely denied access to public school services. They had received "training" in social service training centers or in institutions. It is undisputed that due to the known needs of retarded children, the duration of these programs was for eleven and-a-half months. *GARC,* 511 F.Supp. at 1267. Nevertheless, it is also un-

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1. Each set of defendants has filed a petition. These have been separately docketed as 83-1431 and 83-1451. Respondents file this single brief in response.

disputed that these training services were of inferior quality and provided by uncertified instructors. *Id.* On March 3, 1978 Mr. and Mrs. Caine attended an "IEP" conference about their son. At that time the duration of schooling for all children was already planned and limited to 180 school days. Russell, despite requirements of the Act, had not yet been evaluated by the local defendants. The duration of his IEP was due to the policy of restricting educational services to programs of 180 days. *Id.* at 1268-69. It was not based on his individual needs and it was not based on any choice of educational theories.

The Caines appealed the placement decision in April 1978, under the Act and Section 504. At no time during the administrative process was an objection raised to the concurrent coverage of these two federal statutes.

During the administrative procedures the local defendants offered the testimony of State Board personnel. The testimony demonstrated that they were aware that a child could require more than 180 days of services in order to provide him/her with a "free appropriate public education." At the administrative stage they testified that they had no policy on the 180-day issue. At the beginning of the case they indicated that all children with needs for more than 180 days of educational services could be institutionalized. During the litigation they altered this position to "permit" local boards to establish voluntary programs, but the trial court found that the State's other actions denied children access to even these services. The testimony of these officials over a three-year period of time never established or even suggested that the restrictive policy was due to an "educational" decision. The clash

between the position that no policy existed and the later legal assertions that they had made "educational choices" was never explained. The trial court made findings that State and local defendants maintained policies which prevented the consideration of programs of more than 180-day duration. These were affirmed by the Circuit.

The evidence and findings also do not support the State defendants' scenario of a battle of educational theories. The trial court, weighing the credibility and demeanor of the witnesses, rejected the testimony of local defendant personnel that none of the children required more than 180-day programs. The defendants presented a "study" which they asserted showed that the Chatham County children did not need extended school services. The probative value of this study was rejected by the trial court because of its lack of validity and reliability. *GARC,* 511 F.Supp. at 1274. The study did not address the programs the children were actually receiving. TR. 2704-06; 2780.

The principal experts for each side agreed on the use of both behavioral and developmental methods. TR. 226, 2510. More vital to the instant petition, Dr. Turner, the defendants' expert, admitted that there is no foundation in educational theory to the 180-day program. TR. 2717.

Although plaintiffs criticized many aspects of the educational services provided children in Savannah, TR. 178-180; 815-816, the focus of this case was that the duration of the educational opportunities was insufficient to permit any reasonable progress for many severely retarded children. E.g., PL. Ex. 20 at 44. Testimony of witnesses uniformly agreed that individual consideration of minimal

program needs includes services of a duration in excess of 180 days. TR. 164, 206, 3047-48.

The petitioners suggest that the Caine family is the only one which has stepped forward to request extended school services. This directly conflicts with the testimony at trial. See TR. 346-349; 529-532. It is refuted by the numerous decisions of the State defendants in administrative hearings rejecting parents' claims for school services in excess of 180 days. *GARC,* 511 F.Supp. at 1270, n.5 and n.7. See also, PL. Ex. Nos. 37, 90, 91, 92, 93 and 94. The fact that there are many other families, all Association members, who have been injured by defendants' policies is further demonstrated by nine affidavits submitted to the Circuit in opposition to a motion to vacate the trial court order.

Finally, the petitioners imply that the existing costs of their programs should limit their responsibility for services of adequate duration. The evidence of record indicates that resources were not an issue at trial, nor were they a factor in limiting the available programs. The local defendants had large yearly budget surpluses; the State defendants never utilized their entire State allotment under Title VI-B of the Act. Counsel for local defendants while introducing cost estimates expressly stated to the Court it was not their position that they were without sufficient resources to provide programs. TR. 1085. Moreover, the administrative decision in this case held that available funding was not an issue or a permissible criterion in determining the placement of a child. PL. Ex. 9 at 8-9). This ruling by the State defendants was never challenged at trial.

B. Procedural Summary

Respondents note that each set of petitioners moved the trial court for a stay of plaintiffs' attorney fee pending appeal. This stay was granted and the trial court and the Circuit have not addressed or resolved the right to such an award.

REASONS FOR DENYING THE PETITIONS

A. Summary of the Argument

(1) The decision of the Eleventh Circuit that individual consideration of children's special education needs requires consideration of the duration of teaching opportunities is entirely consistent with Federal law and an unbroken line of decisions. The holding is also consistent with this Court's opinion in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

(2) A Federal Court may entertain concurrent claims under both the Education for All Handicapped Children's Act and the Vocational Rehabilitation Act if a named representative has exhausted administrative remedies and if further exhaustion is futile. There are no cases which conflict with the Circuit's decision on permitting these claims for relief.

(3) The entitlement to appropriate education services is clear under federal law. This obligation has been voluntarily assumed by the State of Georgia, and, therefore, a finding which clarifies the procedural rights of

children or construes the term "appropriate" does not conflict with *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981).

(4) The holding under Section 504, 29 U.S.C. §794, that "otherwise qualified" children must be individually educated and provided programs which grant them an opportunity to benefit from their education does not conflict with *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

(5) The moving of class representatives from the district of one set of defendants, if it occurs after certification and after judgment, does not by itself moot the class claims against those defendants. A Federal Court's limited holding that Federal due process procedures were violated by the failure to adequately consider the duration of educational services is sufficiently concrete to permit relief under Article III of the Constitution.

B. Argument

I.

Every Federal Court Reviewing The Special Education Requirements Has Held That School Services On A Yearly Basis Must Be Considered. These Holdings Are Based On The Requirement of Individual Consideration.

(a) All The Circuits Agree That Individual Needs Require The Consideration Of A Child's Duration of Educational Services.

The holdings of the district court and the Circuit are consistent with an unbroken chain of decisions concerning

special education services. Prior to this Court's decision in *Board of Education of Hendrick Hudson Center School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982) (hereinafter *"Rowley"*), courts had anticipated that ruling and its emphasis on the individual needs of students. They permitted claims for schooling in excess of 180 days or invalidated policies which restricted the consideration of such programs. These courts included: *Battle v. Pennsylvania,* 629 F.2d 269 (3rd Cir. 1980), *cert. denied,* 452 U.S. 968 (1980); *Anderson v. Thompson,* 495 F.Supp. 1256, 1265 (E.D. Wis. 1980), *aff'd on other grounds,* 658 F.2d 1205 (7th Cir. 1981); *Garrity v. Gallen,* 522 F. Supp. 171, 240 (D. N.H. 1981); *Lee v. Clark,* No. 80-0918 (D. Hawaii, Jan. 30, 1981); *Moore v. Roberts,* No. LR-C-81-419 (E.D. Ark., July 24, 1981); and *Hilden v. Evans,* No. 80-511-RE (D. Oregon, Nov. 5, 1980). See discussion, *Yaris v. Special Sch. Dist. of St. Louis County,* 558 F.Supp. 545, 556-57 n.4. (E.D. Mo. 1983). Cf. *Bales v. Clark,* 523 F.Supp. 1366 (E.D. Va. 1981).

The Federal courts which have reviewed this issue since *Rowley* all agree that the 180-day rules violate Federal law. *Crawford v. Pittman,* 708 F.2d 1028 (5th Cir. 1983); *Yaris v. Special Sch. Dist. of St. Louis County,* 558 F.Supp. 545 (E.D. Mo. 1983); and *Phipps v. New Hanover County Bd. of Education,* 551 F.Supp. 732 (E.D.N.C. 1982). Moreover, other states have flexible rules which permit more than 180 days. See, e.g., *Timms v. Metro. Sch. Dist. of Wabash County, Ind.,* 722 F.2d 1310, 1316 n.2, 1317 n.3 (7th Cir. 1983).

This consistency urges against the need for certiorari. The petitioners have not cited a single case which holds

that severely handicapped children should not have the duration of their educational programs based upon their individual needs. They have not shown any grounds under Rule 17 of this Court for granting this petition.

(b) The Holdings In This Case Do Not Conflict With Rowley.

In *Rowley* this Court held that Federal courts may review actions of educational agencies to assure that the Act's procedural requirements have been followed and to assure that the services provided the children are "individually designed" and reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 at 3048, 3051.

The trial court, in the instant case, relying on the emphasis on the individual needs of the student and citing *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), held that the defendants' refusal to consider educational programs of more than 180 days was a procedural violation under the Act. It then afforded relief by enjoining the arbitrary procedures and requiring that IEP meetings address the unique needs of each handicapped child. The Eleventh Circuit affirmed this result. *Accord, Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

In essence, the holdings reason that the duty to provide appropriate programs to handicapped children becomes more complex as their impairments increase. The test of appropriateness, as this Court recognizes in *Rowley*, is more difficult than whether the child is achieving on grade level. The Act does require that goals and criteria for achieving them be developed in the child's IEP. If

these were adequately designed but are not achieved or the child's condition regresses, then *Rowley* teaches that prospective changes in the program may be necessary. See also, *Battle v. Pennsylvania,* 629 F.2d 269, 276-277 and n.9, (3rd Cir. 1980). One option open to school committees must be to increase the duration (or teaching opportunities) available to the children. See, TR. 3047-48. The decision below held that this must be considered on an individual basis and that the inflexibility of the 180-day rule violated the procedural requirements of the IEP process. The Eleventh Circuit below and the Third and Fifth Circuits are correct in their analysis. They apply the rationale of *Rowley* to difficult decisions concerning severely impaired children.

II.

The Act And Section 504 Can Be Applied Concurrently In Considering The Needs Of Handicapped Students.

(a) The Circuits Do Not Conflict On The Maintenance Of A Claim For Relief Under Both Federal Statutes.

The petitioners assert that there is a conflict in the Circuits concerning whether a plaintiff may bring a claim under both Section 504 and the Act. The leading case they cite is *Timms v. Metro Sch. Dist. of Wabash County, Ind.,* 718 F.2d 212 (7th Cir. 1983). That opinion was amended on November 18, 1983 by the Seventh Circuit directly on the point in issue. The Court then held that Section 504 and the Act may be raised in the same matter. *Timms v. Metro Sch. Dist. of Wabash County, Ind.,* 722 F.2d 1310, 1317 (7th Cir. 1983).

The petitioners also cite *Anderson v. Thompson,* 658 F.2d 1205 (7th Cir. 1981) in support of this conflict. That opinion addresses the interplay between the Act and 42 U.S.C. §1983. *Timms* makes it clear that *Anderson* did not foreclose Section 504 claims.

The remaining cases cited in support of a conflict, *Smith v. Cumberland School Committee,* 703 F.2d 4 (1st Cir. 1983) and *Doe v. Koger,* 710 F.2d 1209 (7th Cir. 1983), each address attorney fee considerations. The question of whether an attorney fee may be awarded pursuant to 42 U.S.C. §1983 and/or 29 U.S.C. §794a is significantly different than an analysis of whether a claim for relief may be plead concurrently under the Act and 29 U.S.C. §794. More telling, the attorney fee issue is not available for review as it was stayed by the trial court on the defendants' motion.

A closer review of the decisions shows that in addition to the Seventh and Eleventh Circuits, the Second, Third, Fifth and Eighth have all permitted concurrent claims under the Act and Section 504. See, respectively, *Jose P. v. Ambach,* 669 F.2d 865, 871 and n.4 (2d Cir. 1982); *Tokorcik v. Forest Hills Sch. Dist.,* 665 F.2d 443, 449 and n.8 (3d Cir. 1981); *S-1 v. Turlington,* 635 F.2d 342, 347 (5th Cir.), *cert. denied,* 454 U.S. 1030 (1981); and *Monahan v. Nebraska,* 687 F.2d 1164, 1170 (8th Cir. 1982), *cert. denied,* — U.S. —, 103 S.Ct. 1252 (1983).

(b) Exhaustion of Administrative Remedies Is Not An Issue In This Case.

Petitioners cite numerous cases which seem to conflict on whether the exhaustion of administrative remedies

under 20 U.S.C. §1415 and/or 34 C.F.R. 104.36 are required. The Caine family in this case exhausted its remedies by completing administrative hearings under both the Act and Section 504. The courts below have never had to address the necessity of exhaustion and that conflict, if it exists, is not available for review in this case. Moreover, it is well-settled that futility excuses exhaustion requirements. The existence of the restrictive policy, when coupled with the numerous futile efforts by parents in the administrative process, counter balances any duty to further exhaust.

(c) Exclusivity It Not Required.

The petitioners misplace their reliance on *Brown v. General Services Administration,* 425 U.S. 820 (1976) in urging the exclusive nature of the Act. The argument neglects the clear history that the enforcement of the Act and Section 504 were knowingly designed to complement each other. See descussion, *GARC v. McDaniel,* 716 F.2d 1565, 1579-80 (11th Cir. 1983).

This argument also overlooks the impact of the 1978 amendments to Section 504. P.L. 95-602, 92 Stat. 2982. The provisions of 29 U.S.C. §794a(a)(2) granted handicapped persons the remedies and procedures of Title VI of the Civil Rights Act of 1964. In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), this Court held that Congress understood that Title VI created a private right of action. In 1978 Congress knew that the courts were permitting private litigation under both Title VI and Section 504, and they also knew that the agency and the courts were concurrently applying these statutes. This drastically contrasts with the situation analyzed in *Brown* con-

cerning Title VII. Exclusivity was not intended in the passage of the Act in 1975 and in the amendment of Section 504 in 1978.

Finally, the trial court granted relief under both statutes. Review of the Section 504 claims will leave undisturbed the holding under the Act. The Section 504 issues are themselves insufficient to require that this case be reviewed under this Court's discretionary authority.

III.

The Act Creates A Clear Entitlement To Appropriate Education Services. This Right Does Not Abrogate The Holding in Pennhurst.

This Court decided in *Rowley* that the Act creates enforceable rights. *Rowley,* 458 U.S. 176, 102 S.Ct. 3034, at 3048-49. In spite of this holding the petitioners utilize the "unambiguous" condition language in *Pennhurst v. State School v. Halderman,* 451 U.S. 1 (1981) (hereinafter *"Pennhurst"*) to suggest that the Circuit erred. This reliance is misplaced.

It is clear from *Rowley* that the Act's requirement that individual needs be determined by the IEP may impose an obligation to provide services which are not delineated in the legislation. The Act does impose the duty of appropriateness, 20 U.S.C. §1401(18). It also requires that the ***duration*** of the services must be established in the IEP process, 20 U.S.C. §1401(19)(D), and that there can be a court review to determine if the procedures and program offered are appropriate, 20 U.S.C. §1415(e). This Court and the Circuits have noted that Congress intentionally choose to create a right but did not identify each type of

service which would be necessary. Its focus was on the process and a child's progress.

These requirements overcome the ambiguity argument. Further, the Court in *Pennhurst* cites *King v. Smith,* 392 U.S. 309 (1968) as an example of Congress' capability of imposing an explicit condition on funds. *Pennhurst,* 451 U.S. 1 at 17-18. In *King,* the issue was whether the definition of "parent" which included the mother's paramour, violated that funding statute. The Court held that the term "parent" was unambiguous and that services the State said they did not foresee could be required based on a construction of that term. In this case Congress provided more notice than in *King* through its use of the word "appropriate," Congress has put the state on notice that this term creates an entitlement to a range of services. The "ambiguity" argument should not be used to circumvent the duty to provide necessary programs.

IV.

Education Services Are Enforceable Under Section 504.

The class in this case consists of handicapped children who can benefit from school if provided appropriate services. They have a State constitutional right to education and a Federal statutory right to special education. They are "otherwise qualified" persons under Section 504.

In spite of this, the petitioners state that Section 504 does not require "affirmative programs" and, therefore, the Circuit erred in granting relief under this statute. They cite *Southeastern Community College v. Davis,* 442 U.S. 397 (1979). That holding was predicated on the finding

that the nursing student was not "otherwise qualified" for the program. The trial court in this case made an uncontested finding that plaintiff class was qualified for educational services. Moreover, the obligations to school age children under the Act and the duty of a college to an applicant are cut from such different cloth that reliance on *Davis* is misplaced. Ms. Davis had no right of entry into the program, only a right of reasonable accommodation if she meets their standards for acceptance. The plaintiff class has a right to education suited to their needs which recognizes that they are handicapped but still provides them an opportunity to learn.

The petitioners also overlook that the trial court relied on *Lau v. Nichols*, 414 U.S. 563 (1974) in its Section 504 holding. That holding forecloses the local defendants' argument that their obligation is limited to only providing programs available to non-handicapped students. Further, the *Lau* holding is reinforced by the several opinions in *Guardians Association v. Civil Service Commission of City of New York*, — U.S. —, 103 S.Ct. 3221 (1983). The prospective provision of more than 180 days of service, if such is necessary for a child to benefit from education, is in accord with this holding. The Title VI standards apply to Section 504 by virtue of 29 U.S.C. §794a.

The petitioners also claim that the ruling orders affirmative actions outside the mandate of Section 504. This argument is not supported by the record. They never demonstrated any financial restraints and they never attacked the State administrative decision on this issue. Moreover, the scope of the relief indicates that the "line between a lawful refusal to extend affirmative action and illegal dis-

crimination" has been carefully drawn to include individual programs for these handicapped children. *Southeastern Community College v. Davis,* 442 U.S. 397, 412 (1979).

V.

Plaintiff Class Presents Live And Justiciable Issues.

(a) The Case Is Not Moot Against Local Defendants

One of the named class representatives, after entry of judgment, moved from the local defendants' county. This individual retains his claims against the State defendants. The mooting of his individual claims against the local defendants after certification does not render the action moot. *United States Parole Commission v. Geraghty,* 445 U.S. 380 (1980). Further, Russell Caine (and the Association) may still represent class claims against the local defendants as they continue to "fairly and adequately protect the interests of the class." *Id.* at 405, 406-407, quoting *Sosna v. Iowa,* 419 U.S. 393, 403 (1975). See, *Califano v. Yamasaki,* 442 U.S. 682 (1979). Additionally, the fact that other class members have not exhausted is not dispositive of the mootness issue. It is well-settled in other areas where Congress created jurisdictional prerequisites to suit that non-exhausting individuals may maintain the action and seek relief. See, *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1975); *Romasanta v. United Airlines, Inc.,* 537 F.2d 915 (7th Cir. 1976) *aff'd sub nom, United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977). The Caines and the Association maintain a stake in the outcome.

(b) The Circuit Affirmed Relief To Real Litigants

The petitioners also suggest that the trial court opinion was advisory and should therefore be vacated. To the contrary, the relief afforded respondents was appropriately limited by the trial court to minimize judicial intrusion into educational decisions. Anticipating *Rowley*, the District Court found that the defendants had violated the procedural requirements of the Act. It enjoined the impermissible policy and returned all of the plaintiff children to the IEP process for reconsideration of their needs. This relief was structured to make as limited an intrusion on educational agencies as necessary.

The adjudication of procedural violations is the essence of *Rowley*. The findings in this case show an impairment which produced a legally cognizable injury. *Baker v. Carr*, 369 U.S. 186, 208 (1962). The relief went to the heart of the respondents' entitlement: a fair, unbiased individual educational plan. See, *Califano v. Yamasaki*, 442 U.S. 682 (1979).

CONCLUSION

Respondents strongly resist certiorari. The lower courts are in agreement on the rights and procedures afforded handicapped children. Some of the issues urged for review are not presented in this case and have not been analyzed by the Circuit or trial court. Moreover, the relief afforded plaintiffs speaks of a careful and limited role of the trial court. The Court has corrected the

procedures and returned plaintiff and class members to the IEP process for a review of their needs.

Respectfully submitted,

/s/ JONATHAN A. ZIMRING
ROSE E. FIRESTEIN
/s/ PHYLLIS J. HOLMEN
JOHN L. CROMARTIE, JR.

Suite 630
133 Carnegie Way
Atlanta, Georgia 30303
(404) 688-4000

Suite 800
133 Luckie Street
Atlanta, Georgia 30303
(404) 656-6021